AUGUST 2021 CASES UPDATE

NEWS

Closing the Loop coming up

After a false start last month, we are all looking forward to being able to attend this year's conference on 9 September 2021 at Adelaide Oval, and in-person! KJK Legal are again proud to be supporting the event, and SISA, as a sponsor. We encourage you to register for the event if you haven't already, as this year's program looks very interesting, covering a broad range of topical WHS issues. Registration can be made here.

Both Sides of the Fence

On the topic of supporting industry events, KJK Legal are also co-sponsoring this year's Both Sides of the Fence event, the pre-eminent workers compensation seminar in South Australia. And as a shameless plug – also being the most value for money full day event of its type. If you want to attend this year's event on 29 October 2021, again to be held at Adelaide Oval, then register here.

Suzana Jovanovic gets promoted

The Directors at KJK Legal are pleased to announce the promotion of Suzana Jovanovic to become an Associate of the firm as of July 2021. Suzana joined the firm in mid-2020 and has become a valued member of the team here, supporting the Directors in their key practice areas of workers compensation, employment relations and workplace health and safety. As well as being busy in her legal practice, Suzana also finds time to contribute to many community initiatives and is a mentor to law students as well.

Save the Date – KJK Legal presenting their next Webinar in November

Following on with the trend of webinars being preferred over face-to-face seminars, KJK Legal are finalising details of their next webinar series, to be held on **Wednesday, 17 November 2021**. Further details will be provided in our next Update.

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RECENT CASES OF INTEREST AT THE SAET

PATEL V RETURN TO WORK CORPORATION OF SOUTH AUSTRALIA (NO. 2) [2021] SAET 90 (6 MAY 2021)

ATIE V RETURN TO WORK CORPORATION OF SOUTH AUSTRALIA (NO. 2) [2021] SAET 104 (25 MAY 2021)

CANALES-CORDOVA V RETURN TO WORK CORPORATION OF SOUTH AUSTRALIA [2021] SAET 130 (29 JUNE 2021)

COMPLETE WINDSCREENS SERVICE PTY LTD V RETURN TO WORK CORPORATION OF SOUTH AUSTRALIA (PETER STEAD) (NO. 2) [2021] SAET 143 (15 JULY 2021)

Topic: Costs

Commentator: Melanie Conroy

So far this year there have been four cases before the SAET that considered the reasonableness of awarding costs. One has involved a cost penalty against a registered employer who was involved in proceedings.

These cases are useful to help provide an understanding of the circumstances in which there may be a reduction of costs and will be of interest to self-insured and registered employers, and show yet again how hard it can be to achieve any significant cost penalty against a worker in litigation.

The way costs work under the RTW Act is the worker is normally entitled to recover legal costs from the Compensating Authority for work that relates to a dispute in the South Australian Employment Tribunal, whether or not the dispute is ultimately successful.

A worker may not be able to recover legal costs if the worker acted unreasonably, frivolously, or vexatiously in relation to the dispute. If the worker acted *frivolously or vexatious*ly in bringing the dispute, or their conduct in the course of a dispute was frivolous or vexatious, then the worker may not have their costs paid for, or have their overall entitlement reduced. They also risk being ordered to pay some or all of the compensating authority, or employer's legal costs under section 106(3) of the RTW Act.

There are instances in the course of a dispute when putting a worker on notice of costs may be warranted, which warns the worker that should the SAET find they acted unreasonably, then a costs order will be sought against them. Often this decision can only be made at the conclusion of a matter, and after a judgment has been handed down.

In the cases of *Canales-Cordova*, *Atie* and *Patel* the issue of costs was examined. The cases show the conduct of a worker during a dispute will be scrutinised and examined by the SAET for reasonableness. It also shows there is some risk to a worker in not accepting a reasonable settlement offer before a matter proceeds to trial.

In *Patel v Return to Work Corporation of South Australia (No. 2)* [2021] SAET 90, the SAET held Ms Patel acted unreasonably by not taking a settlement offer made by RTWSA prior to the compliance conference. Ms Patel's costs were reduced and limited to 90% of what would have been payable.

The worker made a claim for compensation in respect to alleged injuries she sustained to her feet whilst in two separate periods of employment. In one period she was working as a tomato picker directly for D'Vine Ripe. In the other period she was she

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was also employed by D'Vine Ripe, but through the labour hire company MADEC.

The claim made directly against D'Vine Ripe was made over three years after she worked for them, and was statute barred unless there was a reasonable excuse for the delay. What was also at issue was that if the alleged injuries to her feet were found to occur, then were they compensable, and did they result in an incapacity for work.

In respect to the claim against D'Vine Ripe it was found the alleged injuries occurred, they occurred in compensable circumstances, and resulted in a temporary incapacity for work. However, the claim failed as it was found the claim was statute barred.

The worker was found to have acted unreasonably in the conduct of the proceedings because she failed to accept a settlement offer conveyed by RTWSA by way of letter prior to the conclusion of the hearing. Gilchrist DPJ, when making the order for costs, considered the settlement offer made was very close to what was realistically the best outcome had Ms Patel won her case completely. He made comment that had Ms Patel reflected appropriately on the risks of litigation and the weakness of her case, she should have regarded the offer made to her as reasonable and should have accepted it.

Atie v Return to Work Corporation of South Australia (No. 2) [2021] SAET 104, shows that when a worker acts in a misleading fashion and provides misleading evidence, then there will be a reduction of costs.

It was held Mr Atie acted unreasonably in the conduct of the proceedings by knowingly misrepresenting to the court in his affidavit evidence the extent to which he experienced symptoms and impairment of function of his left knee. There were also misrepresentations made to doctors regarding his level of impairment. Therefore, the misleading evidence given by Mr Atie enlivened the application of section 106(3) of the RTW Act.

Rossi DPJ commented the discretion to be exercised when assessing costs involves a consideration of the issues at trial, and the extent to which the unreasonable conduct affected the reasonableness of the worker continuing with the claim. Rossi DPJ noted the trial would not have been very long, and the preparation for trial would not have required the same level of attention, had Mr Atie properly disclosed the full relevant history in his affidavit evidence and to the medical experts when he saw them.

He held it was appropriate for Mr Atie to recover less than the maximum 85% of the Supreme Court Scale set out in section 106(6) of the RTW Act, and he was only entitled to recover his costs of representation of the proceedings at the rate of 60% of the Supreme Court Scale.

In *Canales-Cordova v Return to Work Corporation of South Australia* [2021] SAET 130, the SAET held that the worker, Ms Canales-Cordova, was entitled to fight tooth and nail to persuade the SAET section 22 assessment should stand due to the financial implications that would flow from the decision. The central issue in the dispute was that if there was a valid section 22 assessment then there was potential Ms Canales-Cordova would be seriously injured. Gilchrist DPJ found Ms Canales-Cordova did not act unreasonably. In not agreeing to RTWSA's proposal for a referral to an Independent Medical Advisor (IMA), even though the SAET ultimately made a referral to an IMA. The Court found Ms Canales-Cordova did not act reasonably in not agreeing to a referral to an IMA, as she was entitled to believe that there had been a valid section 22 assessment undertaken by Dr Meegan. As such, even though RTWSA put Ms Canales-Cordova on notice of costs should she not agree to the proposal of a joint referral to an IMA, there was not an adverse costs order made against Ms Canales-Cordova.

Lastly, the case of *Complete Windscreens Service Pty Ltd v Return to Work Corporation*

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of South Australia (Peter Stead) (No. 2) [2021] SAET 143 concerns costs orders against an employer. The primary decision addresses why the Applicant, namely Complete Windscreens' Application for Review of a decision of the Corporation which accepted Mr Stead's claims for compensation was dismissed.

It is important to note that Complete Windscreens were self-represented, and they were provided further time to provide submissions on whether an adverse costs order should be made against them.

The SAET found Complete Windscreens did not act unreasonably in bringing the proceedings and nor did it act frivolously or vexatiously in bringing those proceedings. The SAET found that at the time Complete Windscreens filed their Application for Review they were entitled to proceed based on the (lay and expert) evidence they understood would be given. Additionally, it was accepted by the Court that where a decision of the Corporation has an impact on the premium to be paid by a registered employer that this constitutes a legitimate and direct interest in the outcome of the proceedings and is relevant to a consideration of whether an employer has continued to act reasonably. Overall, the SAET found there was a reasonable basis for them to pursue the matter through the trial process.

In contrast to this the SAET found that the actions of the owners of Complete Windscreens regarding the actual evidence they provided constituted unreasonable conduct. Dishonest, misleading, and unsubstantiated evidence was given which required a substantial amount of time to be addressed in cross-examination.

The SAET ordered for the employer, Complete Windscreens to make a payment towards the costs of representation of the Corporation and the costs of representation for the worker.

Complete Windscreens were ordered to pay 15% of the costs of the representation of the Corporation and 15% of the costs of representation for the worker, as well as the disbursement expense related to the evidence given by an expert witness. In an ordinary case that proceeds to trial this cost penalty could well run to tens of thousands of dollars if the cost reduction runs to say 50%.

Summary: Putting another party to proof, and failing, where significant vested interests are at stake does not necessarily count against a party when it comes to recovering costs. Being dishonest or misleading can well do so.

Jones v Return to Work Corporation of South Australia (Mader Contracting Pty Ltd) [2021] SAET 132 (1 July 2021)

Topic: The power to compel in litigation medical assessments

Commentator: Suzana Jovanovic

The worker sought ongoing income maintenance and medical expenses for multiple injuries which were rejected by the Corporation. In investigating the claims for compensation, the Corporation arranged medical examinations with three doctors of its choosing. During the substantive proceedings, the Corporation sought to have the worker reviewed by two of those doctors again, which was rejected by the worker. Additionally, the employer arranged medical examinations with two doctors of its own, which the worker did not want to attend either.

By an Application for Directions and an Application in the General Form, the employer sought a declaration to compel the worker to be examined by the two doctors of its choosing. The worker opposed the application on the basis that this was unreasonable,

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as he had already been examined by three doctors of the Corporation's choosing during the investigation stage of the claim.

Whilst the Tribunal has power to make an order facilitating the attendance at a medical examination by the worker at the request of a compensating authority or an employer, there needs to be a reasonable balance between the interests of a worker and that of a registered employer as required by section 181 of the RTW Act. The frequency of medical appointments needs to be reasonable. In this case, the employer did not establish good reason to compel the worker to attend the medical examinations it arranged, particularly where it was seeking to do so late in the piece.

Moreover, the fact the employer did not avail itself of the process under section 181 of the RTW Act, even during the dispute resolution phase, counted against it.

The lesson is: Procedural fairness is important. Asking multiple doctors to produce medical reports to achieve a desirable outcome is discouraged unless frequency of the medical appointments is justified, and the right process is followed.

Goddard v Return to Work Corporation of South Australia (Diona Pty Ltd) [2021] SAET 138 (7 July 2021)

Topic: The need to be engaged in proceedings as a registered employer if you want a say in the outcome

Commentator: Suzana Jovanovic

A disputed claim resolved in principle at Conciliation between the worker and Compensating Authority without the employer's participation. The employer did not file or serve a Notice to Be Heard until after the agreement was reached. The employer opposed the agreement that was reached.

It was found the employer had ample opportunity to participate in the proceedings before the in-principle settlement was reached. Given the employer did not file a Notice to be Heard or communicate its interest in the proceedings before the in-principle settlement was reached, orders were made to reflect the settlement.

The lesson learned: The importance for registered employers to consider participating in disputes at the SAET from the earliest possible time, particularly if they have any concern about the effect that a change in the position of the compensating authority may have on its premiums and/or section 18 obligations. It is dangerous for a registered employer to assume the compensating authority will maintain its original decision, or at the least will discuss any proposal to resolve the dispute with the employer, in advance of agreeing to a settlement if the employer is not participating in the litigation.

Ricki Maestri v Return to Work Corporation of South Australia [2021] SAET 137 (5 July 2021)

Topic: Rules around IMA referrals at the SAET

Commentator: Oliver Fragnito

The decision deals with the SAET's discretion to refer an assessment in relation to carpal tunnel syndrome (**CTS**) to an Independent Medical Advisor (**IMA**).

The matter concerned a permanent impairment assessment (**PIA**) made under section 22 of the Act in relation to a right sided CTS and scarring from surgery to treat

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the CTS.

RTWSA argued that there is no reason in having the scarring assessed by way of an IMA as it would be greater than 1%, however acknowledged that they actually had agreed to have the scarring assessed by IMA. They also argued that there were many differences between the PIA and an indicative assessment that took place because of the three months' time difference between the two.

The decision explored in what circumstances the Tribunal can intervene in relation to a PIA, especially when dealing with complex injuries like CTS. It also raised the question whether a party to litigation can pick and choose which parts of the assessment to agree with. If the assessment is to go to an IMA, are all the impairments to be assessed or only a selection? In this case, it was decided that all impairments were to be assessed.

Rossi DPJ in *Storey v Return to Work Corporation of South Australia* [2020] SAET 113, provided a summary setting out the principles where the SAET may intervene in relation to a PIA, and appoint an IMA to assess impairment:

(1) Section 22 of the RTW Act lays down the procedure by which WPIs are to be assessed.

(2) The assessor must be appropriately accredited.

(3) The subsequent assessment report must be in accordance with the requirements of the RTW Act and the IAG's, and be provided in the prescribed format and within the time frames allowed. Further, the report must contain clear rationale for the decision reached, is not to contain material errors, and is required to be complete and accurately reflect assessment findings based upon due rigour and intellectual honesty.

(4) The protocol set out in Chapter 17 of the IAG's are to be followed as to the procedure to be undertaken.

(5) Section 22 of the RTW Act contemplates that in connection with a WPI, there will be only one assessment.

(6) The assessment obtained is not binding upon the Tribunal.

(7) Although the assessment of the assessor is not binding upon the SAET, there is little scope to make a determination of impairment other than in accordance with the accredited assessor's assessment in the absence of cogent evidence that calls into question the assessment.

(8) An object of the scheme for the assessment of WPI is the avoidance of competing medical evidence. In such circumstances, an alternative medical assessment is only available if the SAET is persuaded that it should exercise its discretion to arrange for an assessment by an IMA, rather than rely only on the initial report.

The Judge ultimately decided the high degree of difficulty and complexity required to assess the worker's impairment from CTS must be viewed against the lack of much detail or explanation in the PIA report. In the SAET's view, the PIA was not performed with sufficient rigour or sufficient regard to the requirement of the IAG's and AMA5. Therefore, it was proposed to refer the assessment of all the worker's impairments to an IMA pursuant to section 121(1) of the Act.

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Department for Child Protection v Morris [2021] SAET 146 (21 July 2021)

Topic: The application of section 48 where a worker is totally incapacitated

Commentator: Oliver Fragnito

The worker was assaulted during her employment in 2002. She sustained physical and psychiatric injuries as a result of the incident and was effectively totally incapacitated for work. In mid-2003, the worker was assessed as having 65% WPI and received a non-economic lump sum payment. Her entitlements to compensation transitioned to the RTW Act 2014 (SA) and in light of the degree of her WPI, she was accepted to be treated as a seriously injured worker who would be entitled to weekly payments until retirement age.

In December 2017 the worker was found guilty of drug trafficking. In January 2018 she was arrested for attempting to dissuade a witness from giving evidence against her partner. The day after the worker was remanded in custody, her employer discontinued her weekly payments as a result of breaching an obligation of mutuality and relied on section 48(3)(g) of the Act (a criminal conviction being the sort of scenario you would ordinarily think constituted a breach of obligation of mutuality most days of the week).

So, can weekly payments be discontinued for a breach of mutuality when the worker is totally incapacitated for work by reason of a compensable injury?

The Trial Judge described the worker's behaviour as "egregious" and found that trafficking methamphetamine and dissuading a witness would have constituted a breach of mutuality. However, the worker's total incapacity was not challenged. As a result of this, the Trial Judge found that a potential breach of mutuality argument could not be relied upon to discontinue the weekly payments where the worker was totally incapacitated at all relevant times. The decision was upheld in that the worker had not breached mutuality within the meaning of section 48(3)(g).

Query, had it been argued the worker had capacity for work given that she operated a drug trafficking operation and implemented a scheme to dissuade a witness, would a different decision have been reached? Section 48(2)(e) could also have been used as a ground for the discontinuance of weekly payments in the event the worker was dismissed from employment for serious and wilful misconduct.

The lesson: This case goes to show how important it is to identify the applicable grounds for a determination, and more importantly to be in a position to establish some level of capacity for work, when looking at ceasing weekly payments in certain circumstances. In essence, the SAET's approach is to say you cannot be penalised for acts associated with withdrawing your labour and mutuality, where you have no capacity to perform work anyway.

Harvey v RTWCSA [2021] SAET 139 (13 July 2021)

Boerth v Return to Work Corporation of South Australia [2021] SAET 142 (15 July 2021)

Zwarts v Broadspectrum (Australia) Pty Ltd [2021] SAET 148 (23 July 2021)

Topic: To combine or not combine – the never-ending question

Commentator: Tracey Kerrigan

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The SAET continues to deal with various issues regarding assessment of permanent impairment and combination of injuries. Three recent cases have dealt with aspects of these issues.

In *Harvey*, Lieschke DP dealt with the issue of how a cauda equina syndrome is dealt with under the AMA Guidelines. The DP had to determine whether there was evidence that the worker was suffering a neurological impairment of his bladder and sexual function which was asserted to have arisen as a result of surgery on the L4/5 disc. The PIA assessor assessed each of these impairments but did not make a specific assessment of a cauda equina syndrome. RTWSA asserted that there had to be a finding/assessment of a cauda equina syndrome being present as defined by the IAGs. There was conflicting evidence as to whether the worker had suffered a cauda equina syndrome.

Lieschke DP accepted the evidence that favoured the worker and found the PIA assessment was appropriate. Ultimately the worker was assessed as being seriously injured due to the combination of impairments.

In *Boerth*, the ongoing issue of combination of injuries, primary injuries to the pelvis and right hip and left hip and lower back symptoms that arose subsequently. The worker's original injuries occurred in a fall at work in December 2016. Her subsequent injuries arose in around June 2017.

This case seems to simply be an application of the Supreme Court's decision in *Summerfield*. Nevertheless, RTWSA endeavoured to argue that the injuries did not arise from the same cause and that the provisions of section 22(8)(c) should be narrowly construed. This submission was rejected, and the Judge found the injuries should be combined as they arose from the same 'cause'.

By combining the injuries, the worker achieved a seriously injured worker status.

The only issue to be determined in *Zwarts* case was whether the PIA assessor was required to make a deduction for pre-existing osteoarthritis from the current assessment of whole person impairment. The worker had suffered previous injuries to his right knee and left knee in 1983 and 1998, for which he had surgery for both injuries.

He then suffered a work-related injury to his right knee in May 2015 and a compensable sequelae injury to his left knee in June 2017. He had bilateral knee replacements.

Dr Cullum assessed his PIA at 20% for each leg. He made no deduction for pre-existing arthritis.

Crawley DPJ declined to follow the reasoning of Auxiliary Judge Clayton in *Nicholson* where the judge found that no deduction was required if the worker was asymptomatic. Crawley DPJ examined the meaning of "impairment" in the IAGs. He found that the concept of "impairment" requires a functional restriction, but despite there being no evidence that the knee function was restricted prior to the work injury, he felt Dr Cullum had not addressed the question of derangement. He was also concerned Dr Cullum had not been given sufficient information about the earlier surgeries.

Accordingly, he felt the assessment of Dr Cullum was not reliable and the matter should be referred to an Independent Medical Adviser.

Zwarts demonstrates the importance of providing detailed medical information about prior injuries and/or surgeries when seeking a PIA.

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Mazey v Return to Work Corporation of South Australia [2021] SAET 150 (28 July 2021)

Topic: Serious Injury Application

Commentator: Melanie Conroy

Ms Mazey sought a review by the SAET of a decision of the Corporation which determined she was not deemed to be a seriously injured worker on an interim basis.

In dispute was also the compensability of the additional injuries of gastritis and right sided ulnar neuritis which were secondary to her accepted injuries, of left shoulder, left sided ulnar nerve irritation at the left elbow, and left sided Carpal Tunnel Syndrome (CTS) with scarring.

The parties were in dispute as to how to assess the WPI for the injuries to the left upper limb related to the shoulder and ulnar nerve. If the CTS was included in the whole person impairment (WPI) she would have been assessed as greater than 30% WPI.

Consideration was given to how the CTS should be treated for the purpose of the Whole Person Impairment Assessment. It was noted that Ms Mazey had the CTS surgically treated and the nerve conduction studies post-surgery were normal. The issue was whether, when there is a normal nerve conduction study conducted post-surgery, can there be an allowance of any percentage of WPI, or whether there must be a nil entitlement.

Both parties accepted the reliability of the post-surgery nerve conduction studies of Dr Hall. The SAET held that the evidence presented from Dr Suyapto, Dr Economos and Mr Carney in regard to the CTS was not sufficiently clear for the court to be persuaded the topics have been addressed by Ms Mazey in a way that would support a finding of permanent impairment for CTS in accordance with AMA5.

In the decision the SAET noted the approach to the construction and application of section 21(3) of the RTW Act was previously considered in the matters of *Biz*, *Topsfield* and *Tolosa*.

It is worthwhile to include here the six principles to be considered when making an assessment of permanent impairment for interim serious injury status, as stated in Topsfield:

(1) A decision pursuant to section 21(3) is predicated upon a pending assessment of permanent impairment.

(2) Section 21(3)(a) allows the decision-maker to be satisfied that a worker's injury has or will result in permanent impairment. If not so satisfied, then the decision-maker can decide that it appears that the worker's injury has or will result in permanent impairment.

(3) Section 21(3)(b) only permits the decision-maker to find whether it appears that the degree of WPI is likely to be 30% or more.

(4) The reason for the different powers in the two sub-provisions (section 21(3)(a) and section 21(3)(b) of the RTW Act) is that it is the task only of the accredited assessor that conducts the WPI assessment in accordance with section 22 that will determine the actual WPI percentage.

(5) It is not the function of an interim assessment under section 21(3) to determine the WPI percentage.

(6) To the extent the Tribunal evaluates evidence of WPI percentages, in a review of

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a decision as to whether an injured worker should be treated on an interim basis as a seriously injured worker, it is for the purpose of exercising a judgment as to whether, upon a final assessment, the worker is likely to reach the threshold of 30%.

It is settled law that the word **likely** in the context of making an interim decision on serious injury under section 21(3)(b), means **more probable than not**, as discussed in *Biz v Return to Work SA* [2018] SAET 52.

Additionally, in *Tolosa v Return to Work SA* [2020] SAET 184, the SAET made seven observations on consideration of principles the SAET needs to have regard to when addressing applications under section 21(3). Of most importance is that the worker bears the onus to prove on the balance of probabilities that the injury has or will result in permanent impairment and that it appears the degree of whole person impairment 'is likely to be' 30% or more.

Based on consideration of the expert evidence and by combining the Upper Extremity Impairments, the SAET held Ms Mazey failed to prove that upon a final assessment of WPI she was likely to reach the threshold of at least 30% WPI.

The take home point: When making a serious injury interim decision it must be more probable than not the worker will eventually be classified as seriously injured.

Esposito v Return to Work SA [2021] SAET 151 (29 July 2021)

Topic: WPI Assessment and criteria for diagnosis of CRPS

Commentator: Melanie Conroy

When making an impairment assessment for Complex Regional Pain Syndrome (**CRPS**) the Impairment Assessment Guidelines (**IAG**) require that for an assessment of CRPS to be made, the diagnosis must have been present for at least one year (to ensure accuracy of the diagnosis and allow adequate time to achieve maximum medical improvement).

This case centred on the validity if the WPI assessment undertaken by Dr Suyapto which assessed her CRPS at 30%, and whether there had been a diagnosis of CPRS within 12 months prior to the PIA assessment.

The SAET held the criteria for a WPI Assessment of CRPS was fulfilled. This was because Ms Esposito was under the care of Dr Nguyen and having taken various tests to exclude other possible diagnoses, Dr Nguyen concluded the symptoms were related to CRPS.

The SAET did not agree with the suggestion of the Corporation that once the diagnosis of CRPS was confirmed that a further period of 12 months was required to elapse before a PIA could be undertaken. The SAET accepted that caution would need to be exercised where a retrospective diagnosis was made upon history alone, however this was not the case here as Ms Esposito was under the care of Dr Nguyen and his opinion was that there was a sliding scale of increasing certainty that CRPS was the diagnosis.

The question resolved by the SAET was when the degree of 'suspicion' about CRPS reached the stage where it could be said to have become a diagnosis. On examination of the evidence the SAET was satisfied a diagnosis was made a year prior to the PIA assessment and that a series of prescriptive criteria was not required to be met before a diagnosis could be made.

The SAET also made comment on unliteral communications. It was commented that the Corporations unilateral communication with Dr Suyapto was unacceptable, especially in view of the denial of permission by the Corporation of Ms Esposito's

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request to communicate with the assessor. It was commented on by the SAET that had that not occurred the hearing would have been shorter with possible costs and efficiency savings for the Tribunal.

Coleman-Sleep v Return to Work Corporation of South Australia (Ceduna Koonibba Aboriginal Adelaide health Service) [2021] SAET 144 *(15 July 2021)*

Topic: Is current incapacity for work a pre-requisite for section 18 relief, and other issues?

Commentator: Mark Keam

Rossi DPJ took the opportunity to give his take on section 18 of the Act in this case and confirmed the trending narrow application of the provisions concerned. In recent times worker's advocates have endeavoured to extend the application of the obligation on an employer to provide 'suitable employment' even where there is no current incapacity for work. Rossi DPJ held the relief available to a worker under the provision is only available where there is indeed a current incapacity for work, and not just because there had been an incapacity for work in the past. Notably in this case, the worker who had been totally incapacitated for most of the first 104 weeks post her injury, was suddenly cleared for work.

Additionally, His Honour took the opportunity to address the suggested obligation on a compensating authority to meet the costs a worker might seek to recover in relation to a Recovery and Return to Work Plan sought to be implemented after the expiry of the section 33 entitlement period. His Honour declined to follow the previous judgment of Farrell DP in *Puhara*'s case, finding no good reason why such expenses, as clearly falling within section 33 are to be treated any differently, and in the absence of any specific legislative carve out in that regard.

Finally, His Honour also addressed the key difference between section 18 and other parts of the Act when it comes to duties versus employment. Section 18 is focussed on employment being provided that is suitable. However, in the absence of an ongoing incapacity for work, the provision is not to be used in place of, or as a protection against, the usual employment laws. It is not a vehicle to provide security of tenure. As His Honour stated:

> "… it is unlikely that the legislature intended that the expanded obligation upon an employer to provide suitable employment as contemplated by s18, would extend to circumstances where the injured worker had recovered to a point where there was no ongoing incapacity for work. Otherwise s18 would have the effect of providing security of tenure following an incapacity from work injury, no matter how brief the period of incapacity. That would not be consistent with Object 3(2)(c) of the RTW Act to provide a reasonable balance between the interests of workers and the interests of employers."

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HEADING OFF THE TRACK A LITTLE – SOME RECENT EMPLOYMENT AND WHS CASES

WORKPAC PTY LTD V ROSSATO [2021] HCA 23 (4 AUGUST 2021)

Topic: When is casual employment not necessarily so – the High Court reverses a controversial decision of the Full Federal Court

Commentator: Suzana Jovanovic

Mr Rossato was employed episodically by a labour-hire company, WorkPac between July 2014 and April 2018. Previously, in December 2013, Mr Rossato signed a document titled "Casual or Maximum Term Employee Terms and Conditions of Employment – Employee Declaration".

Between July 2014 and April 2018, a series of six contracts or assignments bearing the title "Notice of Offer of Casual Employment" were provided to and accepted by Mr Rossato. WorkPac treated Mr Rossato as a casual employee at all relevant times.

However, the decision in *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 delivered by the Full Court of the Federal Court of Australia provoked the subject proceedings in that Mr Skene had been employed by WorkPac in similar circumstances to Mr Rossato. The Full Court in *Skene* had held that Mr Skene was not a casual employee for the purpose of the *Fair Work Act 2009* (Cth) (**the Act**) and the applicable Enterprise Agreement. Their Honours suggested that the characterisation of the employment required an assessment of "the conduct of the parties to the employment relationship and the real substance, practical reality and true nature of that relationship". Furthermore, their Honours also turned their minds to "the surrounding circumstances" created by the contractual terms, Act, and applicable Enterprise Agreement in delivering their decision.

In reliance on the Full Court's judgment in *Skene*, Mr Rossato claimed that he was not a casual employee and in turn asserted he was entitled to untaken annual leave, public holidays, personal leave, and compassionate leave taken during the duration of his employment with WorkPac.

Subsequently, WorkPac sought declaratory relief from the Federal Court of Australia and argued that Mr Rossato was a casual employee who should not benefit from the claimed entitlements. The Full Court disagreed with WorkPac and instead declared that Mr Rossato was not a casual employee for the purposes of the Fair Work Act and the Enterprise Agreement, and hence was entitled to the payments claimed by him.

WorkPac appealed the decision to the High Court of Australia. The pivotal issue for their Honours' determination was whether Mr Rossato was a casual employee.

The statutory interpretation was made difficult in that the Act itself did not at the relevant time define the meaning of "casual employment". However, the contextual consideration of the Act indicated that a "casual employee" is one without a "firm advance commitment as to the duration of the employee's employment". Their Honours found that a departure from express contractual terms would indicate an unorthodox legal analysis, and those express contractual terms must be given effect unless they are contrary to the legislative provisions. Furthermore, an implied agreement between the parties needs to be consistent with the contractual terms, and if the mutual undertakings are inferred from conduct then "they may take effect as contractual variations".

The Justices of the High Court criticised the Full Court's decision in *Skene* for departing from the orthodox legal analysis, and not giving sufficient weight to the parties' own

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characterisation of the employment agreement when it commenced.

WorkPac's appeal in *Rossato* was unanimously upheld by the High Court. It was found that the employment arrangements between Mr Rossato and WorkPac did not require a mutual commitment on an ongoing basis once the assignment was completed. Mr Rossato was able to accept or reject assignments that were being offered to him and WorkPac was not obliged to provide assignments to Mr Rossato on an ongoing basis. Ultimately, it was held that Mr Rossato carried out each assignment as a casual employee and thus the Federal Full Court's decision was overturned, even though of itself the worker did undertake a fixed formal roster.

The High Court's decision will serve as a relief for employers who inevitably would have faced sizeable liabilities had the Full Court's decision been upheld in circumstances where employees will fall outside of the new legislative approach of converting casual to permanent employment, as well as defining what true casual employment might mean.

Campbell v City Demolition and Earthmoving Pty Ltd [2021] SAET 153 (30 July 2021)

Topic: Getting it wrong in WHS terms can be costly

Commentator: Lachlan Smith

City Demolition pled guilty to failing to provide safe plant and a safe system of work, exposing employees to a risk of death (section 32, *Work Health and Safety Act 2012*). This occurred after an employee was struck from behind by a falling 230 kg ramp of a low loader caused by a hydraulic failure. This caused serious work injuries (soft tissues, traumatic fractures to spine, pelvis, ankles legs and ribs) and risk of death, resulting in a fine of $133,000 (reduced from $200,000 after guilty plea).

At the rear of the low loader were two heavy ramps held in vertical position by a mechanical restraint, constituted by a chain and strap system. When loading, workers were required to unfasten the mechanical restrain, in close proximity to the ramps. While the ramps were often lowered slowly by a hydraulic system when unfastened, it was possible for the system to fail and the ramps to fall in an uncontrolled manner. This demonstrated the possibility for a worker to be struck or pinned by a falling ramp upon hydraulic failure.

City Demolition failed to ensure chain anchor bolts were in a safe position, allowing employees to release the restraints at a safe distance from the lowering ramps. Further, the defendant failed to provide a chain and strap in strong working condition. The low loader had previously experienced technical difficulties and had been subjected to maintenance over the proceeding years of use. A high degree of objective seriousness was assessed, with the event being reasonably foreseeable. It was also noted the defendant had reverted to a more dangerous system following a Police defect notice, and without seeking expert engineering or WHS advice, which quite possibly would have identified the potential for harm with the use of the machinery in accordance with the system of work implemented.

The upshot: Prevention is almost always less costly than the consequences of something foreseeable going wrong.

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As always, if you seek any further advice on the issues that we have identified above, then please do not hesitate to contact us.

If you wish to undertake further reading in relation to any of the decisions discussed above, they can be found at www.austlii.edu.au.

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